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IN THE

Supreme Court of The United States

October Term, 1963

No. 880

FRANK E. AIPLE, doing business as
AIPLE TOWING COMPANY,

Petitioner,

v.

CENTRAL SOYA COMPANY, INC.,

Respondent.

REPLY BRIEF FOR PETITIONER

CHARLES M. RUSH
JOHN M. O'CONNOR, JR.
Counsel for Petitioner
130 E. Randolph St.
Chicago, Illinois 60601

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Far from demonstrating that the decision below is correct, we believe respondent's brief highlights the errors in that decision and proves the necessity for review and reversal by this Court.

I.

Petitioner contends that a barge delivered for towage with a hatch cover broken off, as this barge was, is manifestly unseaworthy as a matter of law under the decisions of this Court and of other Circuits. To now argue, as respondent does, that the decision below is correct because it held the barge seaworthy and thus no reviewable issue exists is only to beg the very question the petition raises.

The distinctions that respondent (and the Seventh Circuit) attempt to make between this case and the cases cited and relied upon in our petition are distinctions with

out a difference. Respondent's main distinction that the missing hatch cover was not in a "work area" is spurious because, in this case, the crew members *were* required, in order to string out and take in the running lights, to walk at night across the tops of the barges directly in the path of the missing hatch cover. To say that it was perfectly proper for the hatch cover to be missing because respondent did not foresee that crew members might come near it in the course of their nightly duties is but another attempt to convert the doctrine of seaworthiness into an ordinary negligence concept. This Court has consistently rejected all such attempts.

Nor will the fact that the seaman actually recovered in this case (because petitioner paid his claim) prevent the decision below from standing as a precedent to prevent recovery by seamen in future cases where it is contended that conditions like the missing hatch cover here do not render a vessel unseaworthy.

II.

Since the filing of the petition for certiorari in this case, the Court, on March 9, 1964, decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, 32 Law Week 4181. We submit that both the decision and the reasoning in that case require reversal here. Despite respondent's attempt to distinguish stevedoring from towage cases, the principles involved are precisely the same.

In the *Oregon Stevedoring* case, this Court held, contrary to the decision of the Seventh Circuit in this case, that the lack of negligence of an indemnitor does not defeat the right to indemnity. There an implied warranty was involved. Indemnity is *a fortiori* required here, where the warranty was an express one.

Moreover, and signally, this Court declared in the *Oregon Stevedoring* case that the burden of compensating injured

seamen is to be placed ultimately upon the person whose default caused the injury (at 32 Law Week, pages 4183-4184):

> "Where the shipowner is liable to the employees of the stevedoring company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. See *Alaska S. S. Co.* v. *Petterson*, 347 U.S. 396, 401 (dissenting opinion).
>
> "Both sides press upon us their interpretation of the law in regard to the scope of warranties in nonsales contracts, such as contracts of bailment and service agreements. But we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, *American Stevedores, Inc.* v. *Porello*, *supra*, in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. **By placing the burden ultimately on the company whose default caused the injury**, *Reed* v. *The Yaka*, 373 U.S. 410, 414, we think our decision today is in furtherance of these objectives." (Emphasis supplied)

This language is precisely applicable here: the loss should ultimately be borne by respondent, because its default in supplying a barge with a missing hatch cover was the cause of the injury. Moreover, petitioner was in no position to repair or correct the defect.

Respondent and petitioner had identical reciprocal towing contracts. Sometimes petitioner towed respondent's barges and sometimes respondent towed petitioner's. These contracts both provided:

"(4) Owner warrants the tow to be seaworthy and properly equipped and supplied, and in all other respects fit and suitable to be towed, and [the tower] shall not be obligated to inspect any tow and or the stowage of any cargo therein or thereon, but such inspection if made, shall not affect the warranties of Owner as herein expressed." (App. 159, 161)

These clauses, together with the indemnity provision and the fact that 196 foot barges when empty are towed for only 55 cents a mile, all show the clear intent of the parties to place "the burden ultimately on the company whose default caused the injury." 32 *Law Week* at p. 4184.

Further, the indemnity clause of the contract *does* apply to respondent. It was "otherwise liable" on either or both of two grounds—the delivered barge *was* unseaworthy or its condition breached the broader express contract warranty that it was "properly equipped and supplied, and in all respects fit and suitable to be towed." Respondent totally fails to answer this.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles M. Rush
John M. O'Connor, Jr.
Counsel for Petitioner